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No. 96 919

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF ARKANSAS,

Petitioner,

V.

EUGENIA T. DONOVAN,
ARKANSAS TERM LIMITS,
FRANK GILBERT, AND SPENCER G. PLUMLEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Article V of the United States Constitution prohibit the people of the several states from participating in the amendatory process by popular initiatives designed to inform their legislators and congressional delegations of their views?

PARTIES TO THE PROCEEDINGS

Petitioner State of Arkansas was an intervenor in the court below. Respondent Eugenia T. Donovan was the plaintiff in the original action in the court below. Respondents Arkansas Term Limits, Frank Gilbert, and Spencer G. Plumley were intervenors in the court below. Sharon Priest, the Secretary of State of Arkansas, was the defendant below, but she is not a respondent in this Court because the State has reason to believe that she has no interest in the outcome of the petition.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Arkansas Supreme Court's Decision Exacerbates The Conflict Of Authority Among State Courts On The Scope Of Article V's Limits On The Popular-Initiative Process By The People Of The Several States 4

II. The Question Whether Article V Prohibits The People Of The Several States From Expressing Their Preference For Term Limits Or Other Constitutional Change Or Offering Direction To Their Elected Representatives To Secure Such Changes Is An Important Question Which The Court Should Answer 6

III. The Arkansas Supreme Court Erred By Holding That Article V Prohibits The People From Participating In The Amendment Process By Popular Initiative 7

CONCLUSION 10

APPENDIX:

Slip Opinion in *Donovan v. Priest*, 326 Ark. 353, 931 S.W.2d 119 (1996) A-1

Amendment 9 of 1996 ..... A-19

TABLE OF AUTHORITIES

CASES PAGE

AFL-CIO v. Eu, 686 P.2d 609 (Cal. 1984).....5

Donovan v. Priest, 326 Ark. 353, 931 S.W.2d 119 (1996).....1, 4

Hawke v. Smith, 253 U.S. 221 (1920).....3, 8

In re Opinion of the Justices, 148 So. 107 (Ala. 1933).....5

Kimble v. Swackhamer, 439 U.S. 1385 (1978) (Rehnquist, J., in chambers).....8

Kimble v. Swackhamer, 584 P.2d 161 (Nev. 1978), *application for stay denied*, 439 U.S. 1385 (1978), *appeal dismissed*, 439 U.S. 1041 (1978).....5

Leser v. Garnett, 258 U.S. 130 (1922).....3, 8

Ohio v. Robinette, 65 U.S.L.W. 4013 (1996).....3

Opinion of the Justices to the Senate, 366 N.E.2d 1226 (Mass. 1977).....5

Opinion of the Justices, 673 A.2d 693 (Me. 1996).....5

Ray v. Blair, 343 U.S. 214 (1952).....9

State ex rel. Harper v. Waltermire, 691 P.2d 826 (Mont. 1984).....4

U.S. Term Limits v. Thornton, 115 S. Ct. 1842 (1995).....6, 7

STATUTES

28 U.S.C. § 1257(a).....1

Ark. Code Ann. § 7-5-208(f)(5) (Supp. 1995).....9

OTHER AUTHORITIES

Kobach, "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments," 103 Yale L.J. 1971 (1994).....7

Rotunda, "The Aftermath of *Thornton*," 13 Const. Commentary 201 (1996).....7, 9

CONSTITUTIONAL PROVISIONS

Amendment 7 to the Arkansas Constitution.....2

Amendment 9 of 1996.....*passim*

Article V of the United States Constitution.....*passim*

The State of Arkansas respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported at 326 Ark. 353, 931 S.W.2d 119. Appendix at A-1-A-18.

JURISDICTION

The Arkansas Supreme Court entered its judgment in this case on October 21, 1996. Appendix at A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Article V of the United States Constitution provides as follows:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

STATEMENT OF THE CASE

On September 4, 1996, Sharon Priest, the Secretary of State of the State of Arkansas, certified for the November 5, 1996, general election a ballot initiative for proposed Amendment 9 to the Arkansas Constitution. The popular name of proposed Amendment 9 was the "The Congressional Term Limits Amendment of 1996" and was proposed through the ballot-initiative process provided by Amendment 7 to the Arkansas Constitution. Among other provisions, proposed Amendment 9 states that the will of the people of Arkansas is for an amendment to be added to the United States Constitution limiting the terms of members of the United States House of Representatives and Senate, instructs Arkansas' congressional delegation and state legislators to use all of their official powers to ensure adoption of such an amendment, and provides that those elected officials who do not follow that instruction will have "DISREGARDED VOTER INSTRUCTIONS ON TERM LIMITS[,]" printed next to their names on various election ballots. Appendix at A-23.

After the Secretary of State certified the ballot initiative for proposed Amendment 9 and ballots for the general election had been printed, respondent Eugenia Donovan filed an original-action complaint against the Secretary of State in the Arkansas Supreme Court on September 20, 1996. In her complaint, respondent Donovan alleged that proposed Amendment 9 is not the proper subject of a ballot initiative by the people under Amendment 7 to the Arkansas Constitution because it seeks to give the people power to propose amendments to the United States Constitution, a power they do not have under Article V of that Constitution. In her prayer for relief, respondent Donovan sought to have proposed Amendment 9 struck from the ballot, or, in the alternative, to enjoin the Secretary of State from counting ballots cast for proposed Amendment 9. Proponents of proposed Amendment 9, respondents Arkansas Term Limits, Frank Gilbert, and Spencer Plumley intervened in the action to defend the constitutionality of proposed Amendment 9.

In an opinion delivered on October 21, 1996, the Arkansas Supreme Court agreed with respondent Donovan's arguments. The Court held that proposed Amendment 9 violates Article V of the

United States Constitution and this Court's holdings in *Hawke v. Smith*, 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130 (1922), because it indirectly attempts to have the people of Arkansas, instead of its congressional delegation or state legislature, propose an amendment to the United States Constitution. Appendix at A-17. In view of its holding that proposed Amendment 9 is an unconstitutional attempt by the people to amend the United States Constitution, the Court also held that the people did not even have the power to propose Amendment 9 as a ballot initiative. Appendix at A-17. Consequently, the Court enjoined the Secretary of State from either placing proposed Amendment 9 on the ballot or, alternatively, from declaring the results of any votes cast with respect to it. Appendix at A-18.[1]

After the Court issued its opinion, it granted the State's motion to intervene on October 29, 1996. On November 2, 1996, this Court granted the State's and respondents Arkansas Term Limits', Frank Gilbert's, and Spencer Plumley's applications for a stay of the Arkansas Supreme Court's decision and mandate, pending the timely filing of a petition for a writ of certiorari and disposition of that petition. Consistently with that stay, on December 2, 1996, the Arkansas Secretary of State certified the ballots cast in the general election concerning Amendment 9, resulting in the adoption of Amendment 9 by an overwhelming margin, with 445,381 votes cast in favor of Amendment 9 and 288,094 votes cast in opposition to Amendment 9.

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[1]In one passage of its opinion, the Arkansas Supreme Court stated that it was not reviewing proposed Amendment 9's validity, but rather, whether its proponents were entitled to invoke Arkansas' initiative process in the first instance. Appendix at A-6. This and similar statements in the Court's opinion do not provide an adequate and independent state-law ground for the Court's decision insulating its decision from this Court's review. Throughout its opinion, the Arkansas Supreme Court relies on its interpretation of Article V of the United States Constitution for its state-law holding. The Court stated, for example, that "[o]ur discussion of this issue necessitates our review of the powers authorized by Article V of the United States Constitution and the case law that has interpreted those powers[,]" Appendix at A-6, and that "Article V prohibits the action proposed by the measure at hand." Appendix at A-17. Indeed, the bulk of the Court's opinion is spent discussing cases interpreting Article V. Appendix at A-12-A-17. Consequently, the Arkansas Supreme Court's decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law[.]" *Ohio v. Robinette*, 65 U.S.L.W. 4013, 4014 (1996)(quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

REASONS FOR GRANTING THE WRIT

The question the petition presents is whether the people of the several states are barred by Article V from expressing their views through the initiative process in favor of particular constitutional amendments. The answer to this question is of vital importance to determining the role of the people in the constitutional scheme. The Arkansas Supreme Court's decision answering this question not only conflicts with the decisions of other state courts, but also conflicts with this Court's jurisprudence interpreting Article V. Because the Arkansas court's judgment wrongly limits the role of the people in our federal scheme, this Court should grant the petition for a writ of certiorari and review that judgment.

I. The Arkansas Supreme Court's Decision Exacerbates The Conflict Of Authority Among State Courts On The Scope Of Article V's Limits On The Popular-Initiative Process By The People Of The Several States.

The Arkansas Supreme Court concluded that proposed Amendment 9 to the Arkansas Constitution is "clearly violative of the provision in Article V of the United States Constitution that all proposals of amendments to that Constitution must come either from Congress or state legislatures — not from the people." *Donovan v. Priest*, 326 Ark. 353, 371, 931 S.W.2d 119, 128 (1996). State courts are in marked disagreement over whether Article V restricts a state's popular-initiative process as the Arkansas Court concluded it does. The Court should resolve that conflict to ensure unvaried application of Article V throughout the states.

As the court below noted, several courts have interpreted Article V's place in our federal scheme to mean that its amendatory requirements limit voters' popular-initiative power by prohibiting initiatives that effectively only call for a particular amendment to the United States Constitution. In *State ex rel. Harper v. Waltermire*, 691 P.2d 826, 829-30 (Mont. 1984), the Supreme Court of Montana concluded that a proposed initiative that called for the state legislature to make application to Congress for a constitutional convention to propose a balanced-budget amendment (under penalty of interminable

session without pay) ran afoul of Article V's intent that only deliberative legislatures could call for conventions. Similarly, California's highest court rejected that part of an initiative that sought the same effort from the California legislature (under penalty of loss of salary) because Article V could not countenance "puppet legislators coerced or compelled . . . to vote in favor of a proposal . . . ." *AFL-CIO v. Eu*, 686 P.2d 609, 613 (Cal. 1984) (as modified after application for stay denied). The Supreme Courts of Maine and Massachusetts have also offered their opinions that Article V's reference to legislatures excludes initiative measures from the Amendment process. *See Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) (popular initiative to ensure application by legislature for term-limits amendment would violate Article V); *see also Opinion of the Justices to the Senate*, 366 N.E.2d 1226, 1227-28 (Mass. 1977) (meaning of legislature in applications clause of Article V does not include all of legislative processes).

Other courts, however, have not understood Article V to leave the people and the popular-initiative process out of the federal scheme altogether, or even entirely out of the federal amendatory process. In *Kimble v. Swackhamer*, 584 P.2d 161, 162-63 (Nev. 1978), *application for stay denied*, 439 U.S. 1385 (1978), *and appeal dismissed*, 439 U.S. 1041 (1978), the Supreme Court of Nevada upheld (in the face of an Article V challenge) a state law calling for an advisory vote on ratification of the Equal Rights Amendment by the state legislature. The advisory vote was only that, advisory, and did not divest the Nevada legislature of its Article V ratification responsibility. Similarly, the California Supreme Court, although it struck that part of an initiative requiring the state legislature to call for a convention on pain of loss of compensation in *Eu*, 686 P.2d at 613, 622, nevertheless noted that Article V was not transgressed by the part of the initiative that "merely adopt[ed] a resolution urging Congress to submit a constitutional amendment to the states, and mandate[ed] the Legislature to adopt that resolution[.]" *Id.* at 622. Perhaps going the farthest, the Alabama Supreme Court, in a prohibition-era case, concluded that Article V was not violated even by a binding instruction to delegates considering the Twenty-First Amendment at a state constitutional convention. *In re Opinion of the Justices*, 148 So. 107, 110-11 (Ala. 1933).

Thus, as voters around the United States seek congressional

term limits through constitutional amendment, as required by this Court's holding in *U.S. Term Limits v. Thornton*, 115 S. Ct. 1842 (1995) — or as they seek any other political reform — opposite views of Article V's limits on the popular-initiative process simultaneously obtain in several states. As a result, Article V "split[s] the atom of sovereignty[,]" *id.* at 1872 (Kennedy, J., concurring), differently from one state to the next. The comparative valences of a voter's state and federal roles (whatever they might be) in the federal amendatory process, however, should be uniform throughout the nation under Article V's application clause. Only this Court can definitively discern the constitutional weight of those roles and uniformly declare their respective affinity to the initiative and amendatory processes.

II. The Question Whether Article V Prohibits The People Of The Several States From Expressing Their Preference For Term Limits Or Other Constitutional Change Or Offering Direction To Their Elected Representatives To Secure Such Changes Is An Important Question Which The Court Should Answer.

Limiting the terms of members of Congress is an issue of fundamental political importance and of continuing concern to the citizens of the State of Arkansas and millions of other Americans. Two terms ago in *Thornton*, 115 S. Ct. at 1871, this Court held that states cannot limit the terms of their own congressional delegations, noting that "[a]ny change [adopting term limits on congressional service] must come . . . through the Amendment procedures set forth in Article V." By proposing Amendment 9, the voters of the State of Arkansas sought to make known to their elected representatives their wish to have the Constitution amended to reflect their preference for term limits.

Amendment 9 states that "the people of the State of Arkansas desire to amend the United States Constitution to establish term limits . . . ." Appendix at A-22. In parallel provisions, the amendment calls on both federal and state officeholders, consistently with the respective duties of each office, to secure a federal term-limits amendment. Appendix at A-23, A-26. The amendment also provides by parallel provisions that the only consequence of failure to abide its terms is that

the ballot at subsequent elections "shall inform the voters regarding any incumbent and non-incumbent [candidate's] failure to support the Congressional Term Limits Amendment." Appendix at A-23. Thus, proponents of Amendment 9 simply seek the opportunity to be represented by elected officials willing to support term limits. As this Court reiterated in *Thornton*, it is a "'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *Id.*, 115 U.S. at 1845 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

The method by which Arkansas voters have sought, through Amendment 9, to choose whom they please, is not unlike the methods used by voters at the beginning of this century who sought to choose those representatives who supported the popular election of Senators. *See* Rotunda, "The Aftermath of *Thornton*," 13 Const. Commentary 201, 206-09 (1996)(discussing adoption of 17th Amendment); *see also* Kobach, "Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments," 103 Yale L.J. 1971, 1976-80 (1994). As the history of both the adoption of the Seventeenth Amendment and the current efforts to adopt a term-limits amendment make clear, the people of the several states intend to resort to the initiative process to inform their representatives of their desire to amend the United States Constitution. In light of these efforts, it is incumbent upon this Court to decide whether this avenue is available to the people consistently with Article V. In short, this case is important not only because the people of Arkansas seek to choose those who would choose term limits, but also because the Arkansas Supreme Court has erroneously concluded that the people are to be excluded from the process by which they might endeavor to make their choice. That error warrants correction by this Court.

III The Arkansas Supreme Court Erred By Holding That Article V Prohibits The People From Participating In The Amendment Process By Popular Initiative.

The Arkansas Supreme Court erroneously interpreted Article V as prohibiting the people of the several states from expressing any kind of opinion concerning how and whether the United States Constitution is to be amended. That is not and cannot be the law.

Certainly, the Article V jurisprudence of this Court upon which the Arkansas Supreme Court relied does not dictate such a holding. In *Hawke*, the Court held that the people do not have power under Article V to ratify a proposed amendment to the United States Constitution because the methods provided in that Article are exclusive. *Hawke*, 253 U.S. at 227. Similarly, in *Leser*, the Court merely reaffirmed that the method for amending the Constitution is derived from the Constitution. *Id.*, 258 U.S. at 137. Neither of these cases holds that the people cannot express their opinion that they want to have a particular amendment proposed or ratified, however, as the Arkansas Supreme Court held in this case.

In *Kimble v. Swackhamer*, 439 U.S. 1385 (1978)(Rehnquist, J., in chambers), then-Associate Justice Rehnquist agreed with this understanding of *Leser* and *Hawke* when denying an application to enjoin the counting of nonbinding referendum ballots to determine whether the people of Nevada supported ratification of the Equal Rights Amendment. Justice Rehnquist stated that the objection to "citizen participation in the amendatory process[ ]" did not present a substantial question in view of the referendum's "nonbinding character[.]" *Kimble*, 439 U.S. at 1387. He went on to distinguish *Leser* and *Hawke* on the ground that ratification of the Equal Rights Amendment would still be dependent upon the vote of the Nevada legislature, regardless of the vote on the referendum. *Kimble*, 439 U.S. at 1387. He concluded by stating that Article V was not an obstacle to "communication between the members of the legislature and their constituents." *Kimble*, 439 U.S. at 1387-88.

The State recognizes that *Kimble* is not binding authority, but the Arkansas Supreme Court's attempt to distinguish it exposes the fallacy of that Court's reasoning. Amendment 9 admittedly instructs members of Arkansas' legislature and its congressional delegation to do everything in their power to ensure the adoption of a term-limits amendment to the United States Constitution. Under Amendment 9's provisions, however, the only penalty exacted upon those elected officials who do not advocate amending the Constitution is that the electorate will be informed of that fact and, consequently, might vote them out of office — a possibility which the Arkansas Supreme Court admitted exists even without Amendment 9. Appendix at A-17. In other words, under Amendment 9, Arkansas' congressional delegation and its legislators remain free to vote against term limits as they see

fit. The Arkansas Supreme Court was simply wrong to equate citizens voting for candidates with legislators voting for a constitutional amendment or applying for a convention.

A ballot initiative that seeks to inform voters that candidates for their state legislature and Congress have not supported term limits does not violate Article V because it infringes on the deliberative process of applying for a constitutional convention or proposing amendments. In *Ray v. Blair*, 343 U.S. 214, 225-30 (1952), the Court held that requiring electoral college candidates to pledge to vote for particular presidential candidates did not violate the 12th Amendment by virtue of the fact that such pledges impinged upon the electors' independent judgment. In a similar manner, Article V does not guarantee that state legislators and members of Congress will be free from the consequences of their own actions while in office — i.e., give them insurance against "potential political death" — yet that is what the Arkansas Supreme Court held. Appendix at A-17. Even that Court recognized that voters have the right to vote against candidates who do not actively support term limits. The Constitution does not guarantee that participants in the deliberative process will remain insulated from the people they represent.

Apparently, the Arkansas Supreme Court's only objection to Amendment 9 was that it enhances voters' participation by requiring that candidates' views on term limits be printed on the ballot. An informed electorate does not, however, strip legislators of their Article V power. Moreover, the availiability of such information on the ballot — such as a candidate's political affiliation or whether the candidate supports particular measures — has a long tradition in this country, including in Arkansas, and has previously led to the Constitution being amended. *See* Rotunda, *supra*, at 206-09 (discussing adoption of 17th Amendment); Ark. Code Ann. § 7-5-208(f)(5) (Supp. 1995)(requiring candidates' political affiliation to be printed on ballots). The Arkansas Supreme Court's judgment that Article V requires both a nonparticipatory and an uninformed electorate is a judgment that should be corrected by this Court.

CONCLUSION

For the reasons and authorities set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF ARKANSAS

No. 96-1120

Opinion Delivered OCT 21 1996

EUGENIA T. DONOVAN, Individually,
and On Behalf of All Others Similarly Situated,
PETITIONER,
ORIGINAL ACTION

V.

SHARON PRIEST, Secretary of State
of the State of Arkansas,
RESPONDENT,

ARKANSAS TERM LIMITS, FRANK
GILBERT, and SPENCER G. PLUMLEY
INTERVENORS,
PETITION GRANTED.

DONALD L. CORBIN, Associate Justice

Petitioner, Eugenia T. Donovan, citizen and taxpayer, asks this court to enjoin Respondent, Secretary of State Sharon Priest, from placing the proposed Amendment 9 to the Arkansas Constitution on the ballot for the general election on November 5, 1996. Petitioner also requests that any votes that may have already been cast for the proposed Amendment 9 not be counted. We allowed the intervention of three additional parties in this original action, which was filed pursuant to Amendment 7 to the Arkansas Constitution of 1874: "Arkansas Term Limits," the unincorporated sponsor of the proposed Amendment 9; Frank Gilbert, Executive Director of "Arkansas Term Limits;" and Spencer G. Plumley, Chairman of "Arkansas Term Limits."

Petitioner asserts that the proposed Amendment 9 exceeds the legislative powers reserved to the people of this state by our Amendment 7 in that it directly contravenes the amendment process provided for

in Article V of the United States Constitution. Respondent and Intervenors contend that the proposed Amendment 9 does not exceed the powers of the people reserved in Amendment 7 and that, even if it did, Petitioner's challenge to the proposal is a question of substantive constitutional law that is not yet ripe for our review. Our jurisdiction to hear this case is original and exclusive pursuant to Amendment 7 of the Arkansas Constitution.

I. Justiciability

Respondent and Intervenors urge us to decline review of Petitioner's constitutional challenge to the proposed Amendment 9 because the issue is not ripe for adjudication and, as such, any opinion issued by this court on the matter would be purely advisory. Petitioner asserts that our review of the sufficiency of the petition for this proposed amendment, as provided in Amendment 7, necessarily encompasses the issue of whether the proposal is within the powers reserved to the people in Amendment 7. Petitioner argues that the people of this state do not have the right to propose such a measure as the proposed Amendment 9, which instructs the legislators of this state, along with the Arkansas delegation to Congress, to use all the powers of their respective offices in proposing and securing an amendment to the United States Constitution limiting the number of terms members of Congress may serve. Petitioner asserts that the procedures for proposing amendments to the United States Constitution are specifically and exclusively provided for in Article V of that Constitution. Respondent and Intervenors counter that Petitioner's argument is nothing more than a substantive constitutional challenge to the proposal, and as such, our review of the issue is not proper unless and until the measure has become law.

Our reading of the proposed Amendment 9 indicates that it is procedural in nature, purporting to empower the electorate with an indirect and prohibited means to propose an amendment to the United States Constitution. Hence, we agree that the threshold issue presented requires an analysis of whether such a procedure is encompassed within the powers reserved to the people of this state in Amendment 7.

Amendment 7 to the Arkansas Constitution of 1874 provides in part:

> The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, *but*

> *the people reserve to themselves the power to propose legislative measures, laws and amendments* to the Constitution, and to enact or reject the same at the polls independent of the General Assembly[.] [Emphasis added.]

Amendment 7 further provides that the sufficiency of statewide petitions for initiatives shall be decided in the first instance by the Secretary of State, subject to the review of the supreme court which has original and exclusive jurisdiction over such causes. Upon legal challenges to initiative matters, Amendment 7 places the burden of proof "upon the person or persons attacking the validity of the petition." As to the scope of Amendment 7 and its incorporation of the reserved rights of the people, this court has previously observed that "[t]he voters of this state essentially have, *within constitutional limits,* a right to change any law or any provision of our Constitution they deem appropriate through Amendment 7 to the Constitution." *Dust v. Riviere,* 277 Ark. 1, 4, 638 S.W.2d 663, 665 (1982)(emphasis added). Clearly those constitutional limitations derive from both the United States Constitution and this state's constitution. On the federal level, the rights reserved to the states and to the people of the states originate from the Tenth Amendment to the United States Constitution, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, our Amendment 7 cannot empower the people of this state to initiate any measure, law, or amendment which falls outside the powers reserved to the states and their citizens by the United States Constitution. We understand this to be the essence of Petitioner's challenge.

This court has previously decided cases in which it reviewed the validity of the people's reserved powers of initiative and referendum. In *Czech v. Baer,* 283 Ark. 457, 677 S.W.2d 833 (1984), this court was presented with a challenge to the validity of a proposed local initiative. In determining that such a review of the initiative could be conducted by this court prior to the election, the majority opinion states:

> At the outset the appellees argue that we should permit the measures to be placed on the ballot without first determining their validity. Certainly it is true that a party who resists an initiated petition on grounds such

> as insufficiency of signatures or improper ballot title is not required to question the validity of the proposed measure. On the other hand, that *question may be considered and decided* when it is properly raised, even before the election. *Proctor v. Hammans*, 277 Ark. 247, 640 S.W.2d 800 (1982); *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656 (1912).

Id. at 459, 677 S.W.2d at 835 (emphasis added).

In *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656 (1912), this court considered our state's previous Initiative and Referendum Amendment, which is comparable to our present-day Amendment 7, together with its enabling clause and determined that it was the duty of this court to determine the validity of a proposed amendment before such became law. The court concluded that it must determine whether the proposed measure is *"subject to the initiative power of the people,* and that the petition is legally sufficient[.]" Id. at 591, 149 S.W. at 659 (emphasis added).

More recently in *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992), this court declined to address the petitioners' substantive constitutional challenge as to whether a proposed measure conflicted with the Qualifications Clause of the United States Constitution. The majority opinion did, however, acknowledge that this court had previously addressed constitutional challenges to a proposal's validity, but limited such review to situations where the proposed measure was "clearly contrary to law" and, therefore, should not be submitted to the electorate. *Id.* at 660, 841 S.W.2d at 142. In addition to the consideration of whether a proposed measure is "clearly contrary to law," this court has indicated that in determining whether an issue is justiciable, factors to be weighed include whether the issue at hand is a matter of significant public interest and a matter of constitutional law. *See U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994); *Bryant v. English*, 311 Ark. 187, 843 S.W.2d 308 (1992).

It has been said that the pertinent issue in cases such as this one "is not the hypothetical question whether the law, if passed, would be constitutionally defective; rather, it is the present and ripe question whether the measure's proponents are entitled to invoke the direct legislation process at all." James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64

Notre Dame L. Rev. 298, 314 (1989) (emphasis added). We agree, especially when considering our decisions in *Czech*, *Hodges*, and *Plugge*. We also agree that a case such as this one is ripe for the following reasons: (1) The case is concrete and the record will not be improved by waiting until after the election is held; (2) the factual controversy — whether procedural and subject-matter requirements have been met — exists before the election; (3) post-election events will not sharpen the issues, as no additional facts are necessary for decision; and (4) the issue is not speculative nor hypothetical because the only constitutional issues involved are those that govern the proponents' right to invoke the direct-legislation process. *Id.*

Regarding justiciability in general, this court has previously stated that declaratory relief will lie where (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *U.S. Term Limits, Inc.*, 316 Ark. 251, 872 S.W.2d 349. Here, there is clearly a case in controversy over the effect and application of the proposed Amendment 9 between parties with adverse interests. Certainly Petitioner as a citizen, resident, taxpayer, and registered voter has a legal interest in the controversy. As to the issue of ripeness, the federal courts have viewed it as largely a matter of timing. *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994). In *Thorsted*, the district court pointed out that the United States Supreme Court has recognized the importance in deciding challenges to the constitutionality of election laws when it held that "[j]usticiability in such cases depends not so much on the fact of the past injury but on the prospect of its occurrence in an impending or future election." *Id.* at 1075 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300, n. 12 (1979)).

Other courts have conducted preelection reviews of a proposed measure's validity. In *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920), the United States Supreme Court considered the issue of whether a proposed measure was constitutional under Article V of the United States Constitution before it had been enacted into law. The Supreme Court of California has interpreted *Hawke* as direct authority for the proposition that a state court can remove a proposed amendment from a state election ballot on the ground that it does not conform to Article V, and by implication, that a state court has authority to adjudicate that preelection question. *See, e.g., AFL-CIO v. Eu*, 686 P.2d 609 (Cal. 1984).

Based on the aforementioned decisions of this court as well as other courts, we hold that our review of the sufficiency of a proposed measure, as provided for in Amendment 7, includes a review of whether the measure's proponents are entitled to invoke the direct initiative process when such issue is properly presented. In so holding, we do not conclude that we will entertain substantive constitutional challenges to a proposed measure, such as whether it violates the free speech provision of the First Amendment, before an election has been held. We distinguish such substantive constitutional challenges from procedural challenges in that the former necessarily involve fact-specific issues and thus are not ripe for review until the proposed measure becomes law and a case in controversy arises. Given that the review we are asked to conduct in this case is not one of direct review of the proposed amendment's validity, but rather one of whether the proposed amendment's advocates are entitled to invoke our initiative process in the first place, we will address the merits of Petitioner's challenge. Our discussion of this issue necessitates our review of the powers authorized by Article V of the United States Constitution and the case law that has interpreted those powers.

II. Constitutional Challenge

Article V of the United States Constitution provides in pertinent part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]

The pertinent sections of the proposed Amendment 9 provide as follows:

> (e) It is the will of the people of the State of Arkansas that the following amendment be added to the United States Constitution:

Congressional Term Limits Amendment

Section a. No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section b. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve more than one additional term.

Section c. This article shall have no time limit within which it must be ratified by the legislatures of three-fourths of the several states.

. . . .

(g) Each member of the Arkansas delegation to the United States Congress is hereby *instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits* Amendment set forth in subsection (e) above.

(h) All primary, general, and special election ballots *shall* have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any United States Representative or United States Senator who:

(1) Failed to vote in favor of the Congressional Term Limits Amendment proposed in subsection (e) when brought to any vote;

(2) Failed to second the Congressional Term Limits Amendment proposed in subsection (e)

if it lacked for a second before any proceeding of the legislative body;

(3) Failed to propose or otherwise bring to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above; or

(4) Failed to vote in favor of discharging the Congressional Term Limits Amendment proposed in subsection (e) before any committee or subcommittee upon which the legislator served in the respective legislative body; or

(5) Failed to vote against or reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the Congressional Term Limits Amendment set forth in subsection (e); or

(6) Failed to vote against any term limits proposal with terms longer than those set forth in the Congressional Term Limits Amendment proposed in subsection (e); or

(7) Sponsored or co-sponsored any proposed constitutional amendment or law that proposes term limits longer than those in the Congressional Term Limits Amendment set forth in subsection (e); or

(8) Failed to ensure that all legislative votes on congressional term limits were recorded and made available to the public.

. . . .

(k) The House of Representatives of the State of Arkansas, and the Arkansas Senate, due to the desire of the people of the State of Arkansas to establish term limits for the Congress of the United States, are *hereby instructed to make the following application to the United States Congress*, pursuant to their powers under Article V of the United States Constitution, to wit:

"We, the people and legislature of the State of Arkansas, due to our desire to establish term limits on the members of the Congress of the United States, hereby make application to the United States Congress, pursuant to our power under Article V of the United States Constitution, to call a convention for proposed amendments to the Constitution."

. . . .

(l) All primary, general, and special election ballots shall have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any state senator or state representative who:

(a) Failed to vote in favor of the application set forth in subsection (k) above when brought to a vote; or

(b) Failed to second the application set forth in subsection (k) above if it lacked a second; or

(c) Failed to vote in favor of all votes bringing the application set forth in subsection (k) above before any committee or subcommittee upon which the legislator served; or

(d) Failed to propose or otherwise bring to a vote of the full legislative body the application set forth in subsection (k) if it otherwise lacked a

legislator who so proposed or brought to a vote of the full legislative body the application set forth above; or

(e) Failed to vote against any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the application set forth in subsection (k) above; or

(f) Failed to ensure that all votes on the application set forth in subsection (k) were recorded and made available to the public; or

(g) Failed to vote against any change, addition, or modification to the application set forth in subsection (k) above; or

(h) Failed to attend a hearing, session, or vote of the legislative body concerning any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure to attend resulted in any failure to obtain a quorum sufficient to conduct business; or

(i) Failed to move for, second, or vote in favor of a roll-call vote on any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure resulted in the defeat of any aspect of subsection (e) and subsection (k) above, without recording the votes of individual legislators to be held accountable at a later time.

(j) Failed to vote against any effort to rescind the application.

(k) Failed to vote in favor of the amendment set forth in subsection (e) above, when the amendment was sent to the states for ratification; or

(l) Failed to vote against any term

limits amendment with terms longer than the limits set forth in the proposed amendment in subsection (e) above, when such an amendment is sent to the states for ratification.

. . . .

(n) (1) The Secretary of State of the State of Arkansas shall be responsible for making an accurate determination as to whether a candidate for state or federal legislative office shall have placed next to the candidate's name on the election ballot the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" and for certifying the appropriate indication to the appropriate county clerks and other appropriate voting officials. [Emphasis added.]

It is clear from the aforementioned provisions that the proposed Amendment 9, which bears the popular name "THE CONGRESSIONAL TERM LIMITS AMENDMENT OF 1996," directs both state and federal legislators to use the power of their respective offices to advance the cause of adopting a proposed amendment to the United States Constitution that would limit the number of terms of United States Representatives and Senators. The proposed Amendment 9 also directs the General Assembly to use the power specifically granted to the state legislatures in Article V to ask the United States Congress to call a constitutional convention. The proposed Amendment 9 essentially provides for a vote of the people to initiate the application process for a constitutional convention and, likewise, it provides for a vote of the people to propose to Congress an amendment to the United States Constitution. In the event any individual legislator, state or federal, fails to do as instructed, the proposed Amendment 9 states that the words "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" shall be placed adjacent to their names on any ballots in future elections.

Respondent and Intervenors assert that the proposed Amendment 9 does not contravene Article V because it neither

prevents nor compels any action by any legislator, state or federal; it merely puts the legislators on notice of the desire of the people to have term limits on members of Congress. Further, Respondents and Intervenors assert that the main focus of this proposed amendment is its provision for additional ministerial duties of the Secretary of State, and that there is no binding effect on any legislative power nor any penalty assessed to legislators. As discussed earlier, we limit our review to the only justiciable issue — whether Amendment 7 reserves to the people of the State of Arkansas the power to propose amendments to the United States Constitution and to make application to Congress for a constitutional convention. In order to resolve this issue, it is helpful to review the case law interpreting the provisions of Article V.

In *Hawke*, 253 U.S. 221, the Supreme Court determined that a provision of the Ohio constitution extending the referendum to the ratification process of proposed amendments to the United States Constitution was in conflict with Article V. The Court stated that Article V provides for the proposal of constitutional amendments only by votes of two-thirds of both houses of Congress or upon application of the legislatures of two-thirds of the states, "thus securing deliberation and consideration before any change can be proposed." *Id.* at 226. The Court further states that "[t]he language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution as fixed." *Id.* at 227. The Court defined the term "legislatures" as the representative body which makes the laws of the people — *not* the people themselves. *Id.* In concluding that the power to ratify a proposed amendment to the United States Constitution is derived from that Constitution, the Court wrote:

> It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The *act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.*

Id. at 230 (emphasis added). Ultimately, the Court held that Article V only authorized state legislatures (i.e. the law-making bodies

themselves) to ratify amendments to the United States Constitution. The Court thus concluded that the people, through the process of initiative and referendum, did not have the same power.

Two years after the decision in *Hawke*, the Supreme Court had another occasion to address the ability, or lack thereof, of the people of the states to ratify a proposed amendment to the United States Constitution. In *Leser v. Garnett*, 258 U.S. 130 (1922), the Court held that any measure which purports to place the power to ratify proposed amendments to the United States Constitution in the hands of the people of the states, and which takes such power away from the state legislatures is unconstitutional because it conflicts with Article V. The Court held:

> [T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a *federal function* derived from the Federal Constitution; and it *transcends any limitations sought to be imposed by the people of a State.*

Id. at 137 (citations omitted) (emphasis added).

Respondent and Intervenors argue that neither *Hawke* nor *Leser* is applicable to the situation presented in this case because both cases pertain only to the ratification clause of Article V. Instead, they assert that *Kimble v. Swackhamer*, 439 U.S. 1385 (Rehnquist, Circuit Justice 1978) is controlling. Their reliance on *Kimble* is misplaced, however, as the factual scenario presented in *Kimble* is opposite to that in the instant case. In *Kimble*, the Nevada state legislature had requested an advisory referendum from the people as to their positions on the proposed Equal Rights Amendment to the United States Constitution, ostensibly for the purpose of polling their constituents. Justice Rehnquist, acting in his capacity as Circuit Justice, concluded that the citizen participation in the amendatory process in that particular instance was not unconstitutional because of the *nonbinding* character of the referendum. While acknowledging the soundness of the previous holdings in *Hawke* and *Leser*, Justice Rehnquist concluded that neither of those cases ruled out "communication" between legislators and their constituents. *Id.* at 1387-88. That is not the case with proposed Amendment 9, which we conclude goes beyond a mere advisory referendum or a nonbinding communication between legislators and citizens.

In *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (1984), the Supreme Court of Montana considered the issue of whether the people of that state could dictate to the state legislature that an application be made to Congress to call a constitutional convention. Specifically, the proposed ballot measure, not unlike the one at hand, directed the Montana Legislature to submit application to Congress for a constitutional convention in order to propose a balanced-budget amendment to the United States Constitution. The measure further provided that if the state legislature failed to make such application within ninety days, it had to remain in session, with only three days of permissible recess and without pay to the legislators until such application was made.

Relying on the holdings of *Hawke* and *Leser*, the Montana court held that the word "legislatures," as used in both the ratification clause and the proposal clause of Article V, referred to the legislative bodies of the states. The court reasoned that the framers of the United States Constitution would not have ascribed different meanings to the two instances in Article V where the word "legislatures" is found. The court further echoed the framers' sentiments that the amendatory process should be deliberate, holding that "whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a deliberative representative assemblage acting in the absence of any external restrictions or limitations." *State ex rel. Harper*, 691 P.2d at 830.

The sponsors of the Montana measure argued, just as Respondent and Intervenors do in this case, that the initiative was merely a nonbinding recommendation to the legislature. In rejecting that argument, the Montana court pointed to the express language directing the actions of the legislature as well as the consequences for not following those directions, namely that the legislature would be kept in "perpetual session" and, after a period of ninety days, legislators would no longer receive compensation. *Id.* The court determined that such restrictions violated the spirit of Article V as interpreted in *Hawke* and *Leser*. Finally, the court concluded that "[l]egislative deliberation cannot exist where the outcome is a predetermined specific action. . . . The people through initiative cannot affect the deliberative process." *State ex rel. Harper*, 691 P.2d at 830-31.

In *Eu*, 686 P.2d 609, the Supreme Court of California considered the constitutionality of a similar proposed ballot measure. The

proposed measure at issue there would have compelled the California Legislature, on penalty of loss of salary, to apply to Congress to call a constitutional convention for the purpose of proposing a balanced-budget amendment. In concluding that the proposed measure did not conform to Article V of the United States Constitution, the court stated:

> Article V provides for application by the "Legislatures of two-thirds of the several states," not by the people through the initiative; it envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise.

Id. at 613.

The California court reasoned that the purpose of that state's initiative process is to allow a means of enacting legislation, not a means of conducting public opinion polls. The court stated that the voters were not without remedy, as they had ample opportunity to make their views known to the various candidates through the campaign process. The court acknowledged that the United States Supreme Court had not yet addressed this particular issue involving Article V's proposal clause, but it found the Court's previous interpretations of Article V's ratification clause to be persuasive. Furthermore, the court cited with approval an earlier determination by the Supreme Judicial Court of Massachusetts that the reference to "legislatures" in the proposal clause, like that in the ratification clause, meant the legislative body of a state, not the whole legislative process. *Eu*, 686 P.2d at 620 (citing *Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977)).

The California court further submitted that the framers of the United States Constitution knew exactly what distinction they were making in providing that only "Legislatures" were able to make application to Congress to convene a constitutional convention. Relying on the constitutional analysis in *Hawke*, 253 U.S. 221, and *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920), the court wrote:

> The framers were, of course, aware of the difference between a representative body and the electorate as a whole; they knew that a legislature is a deliberative

> body, empowered to conduct hearings, examine evidence, and debate propositions. Its members may be assumed generally to hold views reflecting the popular will, but no one expects legislators to agree with their constituents on every measure coming before that body. Yet, although undoubtedly aware that the views of a deliberative body concerning a proposed amendment might depart from those of a majority of the voters, *the framers of the Constitution chose to give the voters no direct role in the amending process;* legislatures alone received the power to apply for a national convention, and legislatures or conventions, as Congress chose, the power to ratify amendments.
>
> The only conclusion we can draw from this fact is that the drafters wanted the amending process in the hands of a body with the power to deliberate upon a proposed amendment and, after considering not only the views of the people but the merits of the proposition, to render a considered judgment. *A rubber stamp legislature could not fulfill its function under article V of the Constitution.*

Eu, 686 P.2d at 621 (footnote omitted) (emphasis added).

Most recently, the Supreme Judicial Court of Maine was asked by its house of representatives for an opinion on a proposed initiative measure comparable to the proposed Amendment 9. In *Opinion of the Justices*, 673 A.2d 693 (1996), the Maine court stated that neither the electors of that state nor the state's legislature may control the delegates to Congress in the performance of their duties, because "[s]uch an exercise of control would violate the essence of federalism." *Id.* at 696. The court recognized that once elected by the people of the state, Congressional representatives act on behalf of the nation as a whole. *Id.* In reviewing the proposed initiative under the provisions of Article V, the court held that "it is not within the power of the electors to propose a constitutional amendment. The proposed initiative, if enacted by a referendum vote, would allow the electors to do indirectly that which they are forbidden to do directly." *Id.* at 697.

These three cases from Montana, California, and Maine, along with the Supreme Court cases interpreting Article V's ratification clause, are persuasive authority for Petitioner's proposition that Article V prohibits the action proposed by the measure at hand. Clearly, the proposed Amendment 9 is nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people of this state. This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told. Although the proposed Amendment 9 does not compel such action by the legislature on threat of loss of salary, it is nonetheless binding on the legislators in an extortive manner as failure to heed the amendment's instructions will result in their threatened potential political deaths. Contrary to what Respondent and Intervenors contend, the proposed duties to be given to the Secretary of State by Amendment 9 are not merely ministerial; rather, they amount to substantive penalties that are equivalent to an officially sanctioned recommendation by the State of Arkansas not to vote for such candidates because they disregarded the instructions and wishes of the voters. If, as Respondent and Intervenors assert, the proposed measure is merely a nonbinding attempt to communicate the desire of the people for term limits, then their remedy is to voice their desires at the polls by voting for candidates who share these beliefs.

The proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution that all proposals of amendments to that Constitution must come either from Congress or state legislatures — not from the people. It is an indirect attempt to propose an amendment to the United States Constitution, and as such violates the narrow, specific grants of authority provided in Article V. The proposed Amendment 9 would virtually tie the hands of the individual members of the General Assembly such that they would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue. Consequently, the measure is an impermissible use of the initiative power reserved to the people of this state in Amendment 7 to the Arkansas Constitution and is clearly contrary to law. *See Plugge*, 310 Ark. 654, 841 S.W.2d 139.

Intervenors raise the issue in their reply brief that placing the information "DISREGARDED VOTERS INSTRUCTION ON TERM

LIMITS" adjacent to candidates' names on election ballots is constitutionally permissible as a time, place, and manner regulation under the Elections Clause of Article 1, Section 4, of the United States Constitution. Because we conclude that the proposed Amendment 9 exceeds the scope of the powers reserved to the people in Amendment 7, we need not address this issue. We thus enjoin Respondent from placing the proposed Amendment 9 on the ballot, or alternatively from declaring the results. The mandate is ordered issued on Friday, October 25, 1996, unless a petition for rehearing is filed. If a petition for rehearing is filed, briefing will be on an expedited basis to be set by the clerk.

Petition granted.

GLAZE, J., concurs in the result reached.

INITIATIVE PETITION TO AMEND
THE ARKANSAS CONSTITUTION

TO THE HONORABLE SHARON PRIEST, SECRETARY OF STATE OF THE STATE OF ARKANSAS:

WE, THE UNDERSIGNED LEGAL VOTERS OF THE STATE OF ARKANSAS RESPECTFULLY PROPOSE THE FOLLOWING AMENDMENT TO THE CONSTITUTION OF THE STATE OF ARKANSAS, TO WIT: POPULAR NAME: THE CONGRESSIONAL TERM LIMITS AMENDMENT OF 1996

BALLOT TITLE: AN AMENDMENT TO THE ARKANSAS CONSTITUTION CONCERNING CONGRESSIONAL TERM LIMITS, AND, IN CONNECTION THEREWITH, SPECIFYING A PROPOSED AMENDMENT TO THE U.S. CONSTITUTION THAT LIMITS U.S. SENATORS TO TWO TERMS, FORMER AND INCUMBENT U.S. SENATORS TO ONE ADDITIONAL TERM, U.S. REPRESENTATIVES TO THREE TERMS, AND FORMER AND INCUMBENT U.S. REPRESENTATIVES TO TWO ADDITIONAL TERMS; INSTRUCTING ALL ELECTED OFFICIALS TO VOTE IN FAVOR OF SAID TERM LIMITS AMENDMENT; PLACING ON APPROPRIATE BALLOTS THE INFORMATION DISREGARDED VOTER INSTRUCTION ON TERM LIMITS NEXT TO THE NAME OF AN INCUMBENT U.S. SENATOR OR REPRESENTATIVE (EXCEPT PENDING OR AFTER RATIFICATION OF A TERM LIMITS AMENDMENT TO THE U.S. CONSTITUTION) AND NEXT TO THE NAME OF AN INCUMBENT STATE SENATOR OR REPRESENTATIVE (EXCEPT PENDING AN APPLICATION TO THE U.S. CONGRESS FOR A CONSTITUTIONAL CONVENTION, AND EXCEPT PENDING OR AFTER RATIFICATION OF A TERM LIMITS AMENDMENT TO THE U.S. CONSTITUTION) WHEN SUCH U.S. OR STATE SENATOR OR REPRESENTATIVE FAILS TO TAKE SPECIFIED ACTIONS IN SUPPORT OF SAID TERM LIMITS AMENDMENT OR WHEN SUCH U.S. OR STATE SENATOR OR REPRESENTATIVE FAILS TO TAKE SPECIFIED ACTIONS TO REJECT OPPOSITION TO SAID TERM LIMITS

AMENDMENT; ALLOWING NON-INCUMBENT CANDIDATES FOR U.S. AND STATE SENATOR OR REPRESENTATIVE AN OPPORTUNITY TO TAKE A PLEDGE IN SUPPORT OF SAID TERM LIMITS AMENDMENT; PLACING ON THE APPROPRIATE BALLOTS THE INFORMATION DECLINED TO PLEDGE TO SUPPORT TERM LIMITS NEXT TO THE NAME OF A NON-INCUMBENT CANDIDATE WHO HAS NOT SIGNED SUCH PLEDGE; INSTRUCTING ARKANSAS STATE SENATORS AND REPRESENTATIVES TO VOTE TO APPLY TO U.S. CONGRESS FOR A CONSTITUTIONAL CONVENTION TO BE HELD FOR THE PURPOSE OF PROPOSING AN AMENDMENT TO THE U.S. CONSTITUTION; AUTHORIZING THE SECRETARY OF STATE TO DETERMINE WHETHER CANDIDATES HAVE COMPLIED WITH THE TERMS OF THE AMENDMENT AND WHETHER SUCH DESIGNATIONS SHOULD BE CERTIFIED TO THE COUNTY CLERKS FOR APPEARANCE ON THE BALLOT; ALLOWING CANDIDATES LEGAL CHALLENGES TO THE SECRETARY OF STATES DETERMINATION UNDER THIS AMENDMENT TO BE FILED WITH THE SUPREME COURT OF ARKANSAS AS AN ORIGINAL ACTION; AND TO PROVIDE FOR THE REVIVAL OF UNITED STATES CONGRESSIONAL TERM LIMITS IN ARKANSAS UPON THE PASSAGE OF APPROPRIATE FEDERAL LAW.

Whereas career politicians dominating Congress have a conflict of interest that prevents them from enacting meaningful term limits and making Congress what the founders intended, the branch of government most responsive to the electorate; and

Whereas career politicians, while refusing to heed the desire of the people for meaningful term limits, emassed a nearly five trillion dollar national debt by not only voting year after year to spend far more than they have taken in, but also by voting to increase dramatically their own pay, and also providing lavish pensions for themselves and granting themselves numerous other privileges at the expense of the people; and

Whereas such irresponsible actions on the part of career

politicians have mortgaged the future of not only every American citizen, but also their children and grandchildren; and

Whereas the abuse of power, the corruption, and the appearance of corruption brought about by political careerism is ultimately destructive to representative government by making Congress increasingly distant from the people; and

Whereas the President of the United States is limited to two terms in office by the 22nd Amendment to the United States Constitution, and governors in forty (40) states are limited by those states laws to two terms or less; and

Whereas voters have established term limits for more than 2,000 state legislators, as well as 17,000 local officials across the nation, including state legislators and statewide elective officeholders in Arkansas; and

Whereas in 1992, the people of the State of Arkansas enacted, by an overwhelming majority, an amendment to the state constitution limiting service in the United States House of Representatives to three terms and in the United States Senate to two terms, and which state-imposed Congressional term limits were ruled unconstitutional by the United States Supreme Court; and

Whereas the United States Congress has ignored the desire of the people for meaningful term limits by refusing to submit to the states for ratification an amendment instituting Congressional term limits, and by proposing exceedingly long limits for its own members; and

Whereas it is the people themselves, not the United States Congress, who have in the past by majority vote, and should in the future set limits for the terms of Congressional offices; and

Whereas the people have a sovereign right and a compelling interest in the creation and preservation of a citizen Congress that will more effectively protect the freedom and prosperity of the people, which interest and right may not be as effectively served in any way

other than that proposed by this amendment to the Arkansas State Constitution; and

Whereas with foresight and wisdom our founders, under Article V of the United States Constitution, did provide the people with a procedure by which to overcome Congressional self-interest, by which procedure the people of the several states may call a convention to propose amendments to the United States Constitution when two-thirds or thirty-four (34) states expressly call for a convention; and

Whereas amendments proposed by such a convention would become a part of the United States Constitution upon the ratification of three-fourths of the states (38); and

Whereas the people of the State of Arkansas desire to amend the United States Constitution to establish term limits on Congress to ensure representation in Congress by true citizen lawmakers;

Therefore, be it enacted by the people of the State of Arkansas:

Section 1: Section 3 of Amendment 73 to the Arkansas Constitution is hereby amended to add to the current language the following subsections:

(c) The foregoing provisions in sections (a) and (b) shall be revived upon passage of appropriate federal laws.

(d) It is the official position of the people of the State of Arkansas that all of our elected officials should vote to enact, by amendment to the United States Constitution, term limits for members of the United States Congress that are not longer than: three (3) two-year terms in the United States House of Representatives, nor two (2) six-year terms in the United States Senate, respectively.

(e) It is the will of the people of the State of Arkansas that the following amendment be added to the United States Constitution:

Congressional Term Limits Amendment

Section a. No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section b. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve more than one additional term.

Section c. This article shall have no time limit within which it must be ratified by the legislatures of three-fourths of the several states.

(f) (1) As provided in this subsection, and in subsections (h) and (j) of this section, at each primary, special, and general election for the office of a United States Representative, United States Senator, or any state legislator, the ballot shall inform voters regarding any incumbent and non-incumbent candidates failure to support the Congressional Term Limits Amendment proposed above.

(g) Each member of the Arkansas delegation to the United States Congress is hereby instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits Amendment set forth in subsection (e) above.

(h) All primary, general, and special election ballots shall have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any United States Representative or United States Senator who:

(1) Failed to vote in favor of the Congressional Term Limits Amendment proposed in subsection (e) when brought to any vote;

(2) Failed to second the Congressional Term Limits Amendment proposed in subsection (e) if it lacked for a second before

any proceeding of the legislative body;

(3) Failed to propose or otherwise bring to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above; or

(4) Failed to vote in favor of discharging the Congressional Term Limits Amendment proposed in subsection (e) before any committee or subcommittee upon which the legislator served in the respective legislative body; or

(5) Failed to vote against or reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the Congressional Term Limits Amendment set forth in subsection (e); or

(6) Failed to vote against any term limits proposal with terms longer than those set forth in the Congressional Term Limits Amendment proposed in subsection (e); or

(7) Sponsored or co-sponsored constitutional amendment or law that proposes term limits longer than those in the Congressional Term Limits Amendment set forth in subsection (e); or

(8) Failed to ensure that all legislative votes on congressional term limits were recorded and made available to the public.

(i) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" shall not appear adjacent to the names of candidates for Congress if the Congressional Term Limits Amendment set forth in subsection (e) is before the states for ratification or has become a part of the United States Constitution.

(j) Notwithstanding any other provision of Arkansas law:

(1) A non-incumbent candidate for the office of United States Representative, United States Senator, state representative, or state senator, shall be permitted to sign a "term limits" pledge each time the non-incumbent files as a candidate for such an office. A candidate who declines to sign the "term limits" pledge shall have "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to the candidates name on the election ballot;

(2) Each time a non-incumbent candidate for United States Senator, United States Representative, state senator, or state representative files for candidacy for those offices, the candidate shall be offered the "term limits" pledge until the United States Constitution has been amended to limit United States Senators to two terms in office and United States Representatives to three terms in office;

(3) The "term limits" pledge that each non-incumbent candidate for state and federal legislative offices shall be offered is as follows:

"I support Congressional term limits and pledge to use all of my legislative powers to enact the proposed Congressional Term Limits Amendment set forth in the Congressional Term Limits Amendment of 1996. If elected, I pledge to act and to vote in such a way that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" will not appear next to my name."

The pledge form will provide a space for the signature of the candidate and the date of the signature.

(k) The House of Representatives of the State of Arkansas, and the Arkansas Senate, due to the desire of the people of the State of Arkansas to establish term limits for the Congress of the United States, are hereby instructed to make the following application to the United States Congress, pursuant to their powers under Article V of the United States Constitution, to wit:

"We, the people and legislature of the State of Arkansas, due to our desire to establish term limits on the members of the Congress of the United States, hereby make application to the United States Congress, pursuant to our power under Article V of the United States Constitution, to call a convention for proposing amendments to the Constitution."

(l) Each state legislator is hereby instructed to use all powers delegated to each legislator to pass the Article V application to the United States Congress set forth in subsection (k) above, and to ratify, if proposed, the Congressional Term Limits Amendment set forth above.

(m) Notwithstanding any other provision of Arkansas law:

(1) All primary, general, and special election ballots shall have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any state senator or state representative who:

(a) Failed to vote in favor of the application set forth in subsection (k) above when brought to a vote; or

(b) Failed to second the application set forth in subsection (k) above if it lacked a second; or

(c) Failed to vote in favor of all votes bringing the application set forth in subsection (k) above before any committee or subcommittee upon which the legislator served; or

(d) Failed to propose or otherwise bring to a vote of the full legislative body the application set forth in subsection (k) if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the application set forth above; or

(e) Failed to vote against any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the application set forth in subsection (k) above; or

(f) Failed to ensure that all votes on the application set forth in subsection (k) were recorded and made available to the public; or

(g) Failed to vote against any change, addition, or modification to the application set forth in subsection (k) above; or

(h) Failed to attend a hearing, session, or vote of the legislative body concerning any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure to attend resulted in any failure to obtain a quorum sufficient to conduct business; or

(i) Failed to move for, second, or vote in favor of a roll-call vote on any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure resulted in the defeat of any aspect of subsection (e) and subsection (k) above, without recording the votes of individual legislators to be held accountable at a later time.

(j) Failed to vote against any effort to rescind the application.

(k) Failed to vote in favor of the amendment set forth in subsection (e) above, when the amendment was sent to the states for ratification; or

(l) Failed to vote against any term limits amendment with terms longer than the limits set forth in the proposed amendment in subsection (e) above, when such an amendment is sent to the states for ratification.

(2) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" as required by any of subsections (1)(a) through (1)(j) shall not appear adjacent to the names of candidates for the state legislature if the State of Arkansas has made application to Congress for a convention for proposing amendments to the United States Constitution pursuant to this

amendment and such application is currently effective, has not been withdrawn, and has not expired.

(3) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" as required by either of subsections (1)(k) or (1)(l) shall not appear adjacent to the names of candidates for the state legislature if: the Congressional Term Limits Amendment set forth above has been submitted to the states for ratification and ratified by the Arkansas legislature; or the Congressional Term Limits Amendment set forth and proposed in subsection (e) has become a part of the United States Constitution.

(n) (1) The Secretary of State of the State of Arkansas shall be responsible for making an accurate determination as to whether a candidate for state or federal legislative office shall have placed next to the candidate's name on the election ballot the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" and for certifying the appropriate indication to the appropriate county clerks and other appropriate voting officials.

(2) The Secretary of State, in accordance with subsection (1) of this subsection, shall be responsible for making an accurate determination from any reliable source.

(3) The Secretary of State shall consider timely submitted public comments prior to making the determination required in subsection (1) of this subsection.

(4) The Secretary of State, in accordance with subsections (1), (2) and (3) of this subsection shall determine and declare what information, if any, shall appear adjacent to the names of each incumbent state and federal legislator if the incumbent were to be a candidate in the next general election and shall certify such information to the appropriate county clerks and other appropriate voting officials.

In the case of United States Representatives and United States Senators, this determination, declaration, and

certification shall be made in a fashion necessary to ensure orderly printing of primary and general election ballots with allowance made for all legal action provided in subsections (5), (6) and (7), below, and shall be based upon each Congressional member's actions during their current term of office and any actions taken in any concluded term, if such action was taken after the determination and declaration was made by the Secretary of State previously.

In the case of incumbent state legislators, this determination and declaration shall be made not later than thirty (30) days after the end of the regular session following each general election, and shall be based upon legislative action in the previous regular session or any action taken in any special session in the previous four (4) years, but in no event upon any actions taken before the adoption of this amendment.

The Secretary of State shall provide official notification to the incumbents by certified mail and to the public by official media statement and legal publication in a newspaper of statewide circulation at least two separate times prior to the election, in accordance with the time frames set forth herein.

(5) The Secretary of State shall determine, declare, and certify what information, if any, shall appear adjacent to the names of non-incumbent candidates for state and federal legislator, not later than five (5) business days after the deadline for filing for the office. The Secretary of State shall provide official notification to the candidate by certified mail and to the public by official media statement and legal publication in a newspaper of statewide circulation at least two separate times prior to the election, in accordance with the time frames set forth herein.

(6) If the Secretary of State makes the determination that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall not be certified for placement on the ballot adjacent to the name of a candidate for senator or representative for state or federal office, any candidate or elector may appeal such decision to the Arkansas Supreme Court as an original action within

five (5) business days after the second official newspaper publication of the determination by the Secretary of State or shall waive any right to appeal such decision. The burden of proof shall be upon the Secretary of State to demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in this act and therefore should not have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidates name.

(7) If the Secretary of State determines that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall be certified for placement on the ballot adjacent to a candidates name for a senator or representative for state or federal office, the candidate may appeal such decision to the Arkansas Supreme Court as an original action within five (5) business days after receipt of notification or shall waive any right to appeal such decision. The burden of proof shall be upon the candidate to demonstrate by clear and convincing evidence that the candidate should not have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidates name.

(o) The Arkansas Supreme Court shall hear the appeal provided for in subsections (n)(6) and (n)(7) of this section, on an expedited basis as the first priority among any Supreme Court cases, and shall issue its decision on an expedited basis before any other civil appeals are resolved after submission of the matter to the Arkansas Supreme Court. Failure of the Arkansas Supreme Court to render a timely decision will require the Secretary of State to certify the challenged language for placement on the ballot next to the candidates name.

(p) At such time as the Congressional Term Limits Amendment set forth in subsection (e) has become a part of the United States Constitution, subsections (e) through (o) of this amendment automatically shall be repealed.

(q) Repealer. All laws in conflict with the foregoing are hereby repealed.

(r) Severability. If any portion, clause, or phrase of this amendment is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.